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<b>B.B., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 14-1575</b>
	)	<b>Issued: February 18, 2015</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>FEDERAL AVIATION ADMINISTRATION,</b>	)	
<b>Denver, CO, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

On July 3, 2014 appellant, through counsel, filed a timely appeal of a January 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

The issue is whether OWCP met its burden of proof to terminate appellant's medical and compensation benefits effective April 22, 2013.

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board on two occasions. On March 25, 2004 appellant, then a 45-year-old air traffic control specialist, filed a traumatic injury claim alleging that on March 11, 2004 he injured his back walking down 32 flights of stairs in the performance of duty. He alleged that he sustained a permanent aggravation of his preexisting back condition of lumbar spondylolysis, degenerative disc disease, and lumbar radiculitis. OWCP denied appellant's claim and the Board affirmed the August 15, 2005 and May 30, 2006 decisions denying his requests for reconsideration on November 6, 2006.<sup>2</sup> Following the Board's decision, OWCP accepted his claim for temporary aggravation of preexisting lumbar spondylosis. On February 2, 2009 OWCP terminated appellant's medical and wage-loss benefits effective January 28, 2009 based on a second opinion report of Dr. John D. Douthit, a Board-certified orthopedic surgeon. By decision dated September 8, 2009, an OWCP hearing representative affirmed OWCP's February 2, 2009 decision, finding that the second opinion report was entitled to the weight of the medical evidence and established that appellant had sustained only a temporary aggravation of his underlying back condition. The Board reviewed this decision on November 4, 2010<sup>3</sup> and found an unresolved conflict of medical opinion evidence between Dr. Christopher B. Ryan, Board-certified in physical medicine and rehabilitation and Dr. Douthit, a Board-certified orthopedic physician and second opinion referral regarding whether appellant sustained a temporary or permanent aggravation of his underlying condition. The facts and circumstances of the case as set out in the prior decisions are adopted herein by reference.

On December 1, 2010 OWCP completed a Form ME023 and referred appellant for an impartial medical examination with Dr. Jeffery Sabin, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence. On December 16, 2010 counsel objected to the selection of Dr. Sabin on the basis that there were other appropriate specialists located closer to appellant's home. OWCP responded on December 23, 2010, stating that Dr. Sabin was properly selected. It provided a bypass history demonstrating that two physicians were bypassed due to their specialties. OWCP explained that, as they were hand specialists and appellant had a back condition, they were inappropriate to serve as impartial medical specialists. On January 5, 2011 counsel requested the information relied upon by OWCP to determine that the bypassed physicians were hand specialists, which OWCP treated as a Freedom of Information Act request.

In a report dated January 14, 2011, Dr. Sabin reviewed the statement of accepted facts, medical records, and appellant's history. He listed appellant's preexisting back condition and the posterior spinal fusion from L4 through S1 as well as the removal of hardware. Dr. Sabin described appellant's accepted employment incident and his resulting back pain. He noted that appellant was unable to return to work due to medication required for his back pain and that he retired in 2005. Dr. Sabin stated that he did not have all of appellant's medical records from his treatment in Baltimore, Maryland. On physical examination Dr. Sabin found that appellant had normal gait, and that sensation was normal to light touch in all extremities. Appellant also had

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<sup>2</sup> Docket No. 06-1524 (issued November 6, 2006).

<sup>3</sup> Docket No. 10-983 (issued November 4, 2010).

normal reflexes. Dr. Sabin found that appellant had lumbar flexion of 90 degrees and 30 degrees of extension due to severe exacerbation of his back pain. He reviewed diagnostic testing and found objective evidence for a temporary aggravation. Dr. Sabin stated that there were no imaging studies or physical examination changes to establish a permanent aggravation. He stated that there was no medical reason to have a solid fusion from L4 to S1 and then develop a permanent aggravation in this area. Dr. Sabin opined that at most a soft tissue temporary aggravation would be reasonable. He found that appellant experienced pain with extension and stated that would result from a mobile segment. Dr. Sabin stated that if appellant received injections in a mobile segment proximal to his L4-S1 fusions which provided him pain relief while in Baltimore, then this would be supportive of a permanent aggravation. He concluded that if there was no evidence of a mobile segment above his solid fusion, then appellant's finding supported only a temporary aggravation.

On March 17, 2011 OWCP requested that appellant provide additional medical records from his treatment in Baltimore and allowed 45 days for a response. Appellant submitted his medical records on April 19, 2011. Dr. Stanislav S. Malov, an anesthesiologist, performed L1-2 nerve root blocks bilaterally on October 4, 2004. On October 11, 2004 Dr. Paul D. Gilmore, a Board-certified anesthesiologist, performed L1 through L4 facet injections. Dr. Nelson Hendler, a Board-certified neurologist, examined appellant beginning on September 29 through October 14, 2004 and stated that appellant underwent a nerve root block at L1-2 with 10 percent pain relief, L2-3 nerve root block with 50 percent relief, and L3-4 facet blocks with 20 percent relief. He stated that appellant did not undergo root blocks at L4-5 and L5-S1 due to scar tissue. Dr. Hendler diagnosed L3-S1 facet syndrome as well as L5-S1 disc instability and radiculopathy.

OWCP provided these records to Dr. Sabin on May 10, 2011 as well as an addendum to the statement of accepted facts. Dr. Sabin reviewed this evidence and submitted a report dated May 17, 2011. He stated that appellant had adequate investigation into his motion segments above his solid L4 to S1 fusion and that this investigation did not define a pain generator. Dr. Sabin stated that appellant's medical records established that there was no anatomic or physiologic pain generator proximal to the area of his fusion and, that therefore, there was no objective evidence for any permanent aggravation of his preexisting lumbar condition due to the employment incident. He opined that appellant had chronic pain syndrome related to his preexisting conditions and experienced no residuals of the temporary aggravation due to descending the stairs at work. Dr. Sabin stated that appellant's temporary aggravation and resultant total disability would have ceased two weeks after March 11, 2004.

Appellant underwent bilateral L3-4 facet joint injections on August 15, 2011 and experienced a great reduction in pain. Dr. Roberta P. Anderson-Oeser, Board-certified in physical medicine and rehabilitation, opined on August 30, 2011 that his remaining pain following the injections was in the S1 joints. She injected appellant's right sacroiliac joint on September 12, 2011.

Dr. Ryan, Board-certified in physical medicine and rehabilitation, and the originator of the conflict of medical opinion evidence, examined appellant on September 13, 2011. He provided appellant's history of injury and medical history. Dr. Ryan stated that appellant had three areas of pain: above the area of the fusion; left of the fusion mass at L5; and below the level of the fusion. He stated that appellant experienced an aggravation of his condition due to

overuse of the available motion segments above and below his fusion. Dr. Ryan stated that it was unclear if the aggravation was permanent given appellant's positive response to facet injections.

Dr. Anderson-Oeser preformed additional injections at L2 and L3 medial facet joints on November 21, 2011 and January 11, 2012. She stated that these injections resulted in a reduction in appellant's back pain.

OWCP proposed to terminate appellant's wage-loss and medical benefits on March 13, 2013. It relied on Dr. Sabin's reports, finding that appellant sustained a temporary aggravation of his underlying condition which had resolved. OWCP allowed appellant 30 days to respond. In a letter dated April 11, 2013, appellant's counsel requested that OWCP issue a decision regarding appellant's claim for wage-loss benefits and alleged that Dr. Sabin was improperly selected based on a ME023 form.

By decision dated April 22, 2013, OWCP terminated appellant's medical and wage-loss benefits effective April 22, 2013. In a letter dated May 14, 2013, counsel requested an oral hearing before an OWCP hearing representative.

At the oral hearing on November 5, 2013, counsel argued that Dr. Sabin's reports were not sufficient to resolve the conflict as he did not specifically determine from Dr. Hendler's October 2004 reports that appellant's mobile segments were pain generators. Counsel noted that Dr. Hendler stated that L1-2 nerve blocks provided 10 percent pain relief and that L2-3 nerve blocks provided 50 percent relief. Appellant testified regarding his daily activities including wood carving in bed.

By decision dated January 24, 2014, the hearing representative affirmed OWCP's April 22, 2013 decision finding that Dr. Sabin's report was entitled to the weight of the medical evidence. She found that Dr. Sabin's report established that appellant's ongoing symptoms were due to his preexisting back condition rather than to the accepted employment injury.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>4</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>6</sup> To terminate

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<sup>4</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>5</sup> *Id.*

<sup>6</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>7</sup>

A physician selected by OWCP to serve as an impartial medical examiner should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of the referee designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the referee physician will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.<sup>8</sup> The Board has placed great importance on the appearance as well as the fact of impartiality, and only if the selection procedures which were designed to achieve this result were scrupulously followed may the selected physician carry the special weight accorded to a referee specialist.<sup>9</sup>

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>10</sup>

### ANALYSIS

The Board has previously found that OWCP had not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits and remanded for further development of the medical evidence, including referral to an impartial medical examiner.

On appeal and before OWCP, appellant's counsel argued that Dr. Sabin was not properly selected to serve as the impartial medical examiner. OWCP selected him as the impartial medical examiner on December 1, 2010 through the completion of a ME023 form. In response to counsel's request for additional information regarding the selection of Dr. Sabin, OWCP provided screen shots with a bypass history demonstrating that two physicians were bypassed due to their specialties with "Code S." OWCP's procedure manual provides that Code S indicates an improper subspecialty.<sup>11</sup> This code is used if the case requires a different subspecialty, or if the physician does not evaluate the specific body part or extremity.<sup>12</sup> The

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<sup>7</sup> *Id.*

<sup>8</sup> *Raymond J. Brown*, 52 ECAB 192 (2001).

<sup>9</sup> See *L.W.*, 59 ECAB 471 (2008); *J.L.*, Docket No. 11-164 (October 26, 2011) (finding that an ME023 form alone without screen shots was not sufficient to substantiate the proper selection of the impartial medical specialist). *N.M.*, Docket No. 10-978 (issued November 9, 2010) (ME023 form and screen shoots are not sufficient when the reasons for the bypass are not clear).

<sup>10</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.6 (July 2011; May 2013).

<sup>12</sup> *Id.*

procedure manual provides the example of a physician who will only perform examinations for back conditions but the claimant has an upper extremity injury.<sup>13</sup> In this case, OWCP explained that two physicians were bypassed because they are hand specialists and appellant's claim pertains to a back condition. The Board finds that there is sufficient evidence in this case to document that Dr. Sabin was selected through the appropriate rotational system to ensure against bias and prejudice as the record contains a completed ME023 form as well as screen shots providing appropriate reasons for bypassing other physicians.

The Board further finds that Dr. Sabin's reports are sufficiently detailed and well-reasoned to constitute the weight of the medical opinion evidence and meet OWCP's burden of proof to terminate appellant's wage-loss and medical benefits. OWCP provided Dr. Sabin with a detailed statement of accepted facts and a list of specific questions. In his January 14, 2011 report, Dr. Sabin provided a detailed review of the factual and medical evidence provided him and noted that he had not received the records from appellant's medical treatment in 2004. He listed his findings on physical examination including normal gait and normal sensation to light touch in all extremities. Dr. Sabin concluded that the record and examination before him supplied objective evidence for a temporary aggravation as there were no imaging studies or physical examination changes to establish a permanent aggravation. He explained that there was no medical reason to have a solid fusion from L4 to S1 and then to develop a permanent aggravation in this area. Dr. Sabin stated that if appellant received injections in a mobile segment proximal to his L4-S1 fusions which provided him pain relief in 2004, then this would be supportive of a permanent aggravation, but if there was no evidence of a mobile segment above his solid fusion, then appellant's finding supported only a temporary aggravation.

On May 10, 2011 OWCP provided Dr. Sabin with appellant's treatment records from 2004 which were previously missing from the record as well as an addendum to the statement of accepted facts. In his May 17, 2011 report, Dr. Sabin reviewed the additional medical evidence and stated that appellant had adequate investigation into his motion segments above his solid L4 to S1 fusion and that this investigation did not define a pain generator. He found that appellant's medical records did not establish an anatomic or physiologic pain generator proximal to the area of his fusion and concluded that there was no objective evidence for any permanent aggravation of his preexisting lumbar condition due to the employment incident. Dr. Sabin found that appellant had chronic pain syndrome related to his preexisting conditions and that he experienced no residuals of the temporary aggravation due to descending the stairs at work. He determined that appellant's temporary aggravation and resultant total disability would have ceased two weeks after March 11, 2004.

Dr. Sabin provided an extensive review of appellant's medical records including, the additional information regarding appellant's treatment in 2004. He explained that appellant could not have sustained a permanent aggravation of the portion of his lumbar spine that was solidly fused. Dr. Sabin stated that the medical records did not establish a pain generator from a spine segment proximal to his fusion. As appellant's employment incident did not result in an identifiable change to the spinal segments around his fusion, Dr. Sabin concluded that appellant's employment injury was temporary rather than permanent.

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<sup>13</sup> *Id.*

Following Dr. Sabin's report, appellant submitted additional medical evidence including treatment notes from Dr. Anderson-Oeser and a report from Dr. Ryan. Dr. Anderson-Oeser provided facet injections, but did not offer an opinion as to whether these were related to appellant's underlying condition or his accepted employment injury. These notes are not sufficient to overcome the weight accorded Dr. Sabin as the impartial medical examiner or to create a conflict with his report.

On September 12, 2011 Dr. Ryan stated that appellant had three areas of pain, above the area of the fusion, left of the fusion mass at L5, and pain below the level of the fusion. He concluded that it was unclear if appellant's employment-related aggravation was permanent given his positive response to facet injections. Dr. Ryan was one of the physicians who created the original conflict resolved by Dr. Sabin. This report does not clearly support that appellant has a permanent aggravation as a result of his accepted employment injury and does not establish that his temporary aggravation is ongoing. Without further explanation of his position, Dr. Ryan's report is not sufficient to require further development on the part of OWCP or to create a new conflict with Dr. Sabin's well-reasoned report.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss and medical benefits effective April 22, 2013.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board